IN THE

Supreme Court of the United States

October Term, 1960

No. [illegible]

AMERICAN MOTOR SPECIALTIES CO., INC., *et al.*,
Petitioners,

AGAINST

FEDERAL TRADE COMMISSION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

B. F. Leech,
Attorney for Petitioners,
11 Park Place,
New York City, N. Y.

Meyer Sohrbeck,
Of Counsel,
11 Park Place,
New York City, N. Y.

Legal Aid Press, Inc., 95 Duane St., N. Y. C. Tel. WOrth 4-0580

INDEX

	PAGE
Opinions of the Courts Below	1
Jurisdiction	2
Questions Presented	2
Statutes Involved	5
Statement of the Case	5
Reasons for Granting the Writ	10
1. The Court of Appeals has decided an important Federal Question which had not been, but should be decided by this Court	10
2. The decision of the Court of Appeals is in conflict with the decision of other Courts of Appeal on the same matter	[illegible]
3. The Commission had no jurisdiction to issue the Cease and Desist Order	17
4. The decision of the Court of Appeals is in conflict with the decision of the United States Supreme Court	17
5. The decision of the Court of Appeals and Commission are contrary to the Statutes of the State of New York	19
Argument	20
Appendix A	24
Appendix B	33

PAGE

CASES CITED

Automatic Canteen Co. v. F. T. C., 346 U. S. 61 17

Federal Trade Commission v. National Biscuit Company, 299 F. 733 6

Quality Bakers of America v. F. T. C., 114 F. 2d 393, 400 10

Willapoint Oysters, Inc. v. Ewing, 174 F. 2d 676, 691, 692 13

AUTHORITIES

Congressional Record, Vol. 80, p. 9557 and 9561 ... 43

Order in F. T. C. v. National Biscuit Company 37

Order of Dismissal by Commission of Automatic Canteen v. F. T. C. 40

INDEX TO APPENDICES

Appendix A:

Opinion of the Court of Appeals 24

Order of Affirmance by the Court of Appeals .. 31

PAGE

Appendix B:

Sections 2(a), 2(b), 2(c), 2(f) of the Clayton Act 33, 34, 35

Section 4 of the Robinson-Patman Act 35

Section 1732(a) U. S. C. A. 28 35

Section 44, 15 U. S. C. A. 35

Section 45(b), 15 U. S. C. A. 36

New York Cooperative Corporations Law 36

New York Membership Corporations Law 37

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No.

AMERICAN MOTOR SPECIALTIES CO., INC., *et al.*,
Petitioners,

AGAINST

FEDERAL TRADE COMMISSION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners pray that a writ of certiorari issue to review the decision and order of the United States Court of Appeals for the Second Circuit in this proceeding entered on the 6th day of June, 1960.

Opinions of the Courts Below

The opinion of the Court of Appeals is officially reported in 278 F. (2d) 225 (Appendix A, pp. 24-30). The opinion of the Commission is not officially reported, but is set forth at length on 27a Appendix below. The Initial Decision of the Hearing Examiner and the Order of Cease and Desist are not officially reported and are set forth at length in Appendix below, pp. 19a and 23a.

Jurisdiction

The U. S. Court of Appeals has decided an important Federal question of law which has not been, but should be, decided by this Court. Its decision is in conflict with decisions of this Court, other U. S. Courts of Appeals and the statutes of the State of New York.

The jurisdiction of this Court is invoked under Sec. 28, U. S. C. A. 1254 (1). The Court of Appeals rendered its decision on May 5, 1960. The order based thereon entered on June 6, 1960.

Questions Presented

1. The Court of Appeals has decided an important Federal question which had not been, but should be decided by this Court.

Where the petitioner, Metropolitan Automotive Wholesalers Cooperative, Inc., returned to its members part of the net earnings resulting from its trading operations, in proportion to the members' purchases from or through such cooperative, may the Commission and the Court of Appeals hold as a matter of law, that by virtue of such returned net earnings, the petitioning-members violated Sec. 2(f) of the Clayton Act (15 U. S. C. A., Sec. 13b), if such earnings result partly from purchases made by the cooperative in violation of Section 2(f)?

2. The Commission had no jurisdiction to issue the cease and desist order.

Has the Federal Trade Commission jurisdiction to issue the cease and desist order against the Metropolitan Automotive Wholesalers Cooperative, Inc., and the Automotive Group Buyer, Inc. pur-

suant to Secs. 44 and 45b, 15 U. S. C. A. (Apx. B, pp. 35 and 36), where the complaint fails to allege that such petitioners are engaged in interstate commerce?

3. The decision of the Court of Appeals and Commission are contrary to the statutes of the State of New York.

Where the complaint by the Commission cites one of the petitioners as Metropolitan Automotive Wholesalers Cooperative, Inc., and the Commission introduced into the record the certificate of incorporation of such cooperative (Comm. Ex. 123b, R. 424), proving that such petitioner was organized pursuant to Article 7 of the 1932 New York Cooperative Corporations Law, may the Commission decide that "Respondent, Metropolitan Automotive Wholesalers Cooperative, Inc., is a *membership corporation* * * * by virtue of the laws of the State of New York * * * " (Apx. below p. 10a), when the said Cooperative Corporations Law permits the making of profits for its members and the Membership Corporations Law prohibits the making of any profits? (Apx. B, pp. 36-37).

4. The decision of the Court of Appeals is in conflict with the decision of other Courts of Appeal on the same matter.

Were the Court of Appeals and the Commission correct in holding that before a Hearing Examiner Comm. Ex. 1, 2 and 3 (attached to Pet. Apx. below) constituted competent evidence under Sec. 17(2)(a), 28 U. S. C. A. received into the record over specious objection by the petitioners (M41), when such ex-

hibits, created by the Commission's auditors are analytical charts purporting to prove direct dealings between the petitioning-jobbers and the cooperative's vendors named in the exhibits; and where the auditors admitted that the facts and figures appearing in such exhibits were taken from "* * * documents that are matters of public record * * *" (M. p. 35) in other proceedings then pending before the instant Hearing Examiner; and where the creator of Exhibit 3 admitted that the tabulations he produced were based upon information supplied by an employee of Moog, the vendor named in such exhibit, but that he broke down the figures so supplied and charged the segments thereof to the accounts of individual members, on the same basis that Moog applied the entire amount to the cooperative (M. 29, 31, 38); and where the attorney for the Commission conceded that Exhibit 3 is a "composite of Exhibits 63, 64 and 68 in Docket 5723 in the Moog hearing * * *" (Rep. Ex. 22, R. p. 35); and where the Commission failed to produce for the purpose of cross-examination, the original books of any seller mentioned in these charts and failed to produce a single bill, order, check, memorandum or a work sheet, or a witness with knowledge of the original entries, to establish the probative value and trustworthiness of such analytical charts; and where the five petitioners and the two vendors mentioned in such charts, witnesses for the Commission, testified that all their dealings and transactions were [illegible] with the cooperative (M271-244); and where the attorney for the Commission also admitted that the "voluminous" original books here not produced were produced at two other hearings then pending before the instant Hearing Examiner (M. 31) to which petitioners were not parties;

5. The decision of the Court of Appeals is in conflict with the decision of the United States Supreme Court.

Has the Commission come forward with the burden of proof required under Sec. 2(b) of the Clayton Act, 15 U. S. C. A. to establish that the petitioners knowingly received discrimination in prices under Sec. 2(f) of the Clayton Act, 15 U. S. C. A. solely and only by citing cases against sellers in the Court of Appeals and before the Commission, which held illegal the rebate schedules under which the cooperative purchased merchandise and such illegality was first pronounced more than six years after the complaint was served?

Statutes Involved

Sections 2(a), 2(b), 2(c), 2(f) of the Clayton Act, as amended, 15 U. S. C. A. Section 13;
Section 4 of the Robinson-Patman Act, 15 U. S. C. A. 13b;
Section 1732(a), as amended, U. S. C. A. 28;
Section 44, 15 U. S. C. A.;
Section 45(b), 15 U. S. C. A.;
New York Cooperative Corporations Law of 1932, p. 812;
Section 2, Membership Corporations Law of New York.

All set forth in Appendix B.

Statement of the Case

The petitioners consist of seventeen firms "jobbing" automotive replacement parts in the New York metropolitan area, the Automotive Group Buyers, Inc. and its

successors, Metropolitan Automotive Wholesalers Cooperative, Inc., buyers of automobile parts for their own account, solely for resale and distribution to its members, the seventeen petitioning-jobbers.

The strata of buyers in the automobile parts industry is classified as jobber, distributor, and a warehouseman. A jobber is one who sells over the counter to mechanics, gas stations, and car dealers all of whom are treated as consumers of parts. A distributor is one who sells only to jobbers, and a warehouseman is one who stocks merchandise on his own premises and resells to jobbers. Each stratum buys merchandise on different terms and at different prices. Frequently, manufacturers include in their contracts, annual volume-rebate schedules. Such rebate schedules vary both as to quantity of purchase and rebates allowed thereon.

In 1938, eight of the petitioners sought to organize a cooperative association to buy automobile parts at prices available to large-scale buyers solely for the purpose of meeting the keen competition of General Motors, chain stores, oil companies and kindred large operators.

An examination of the Federal Trade Commission's files disclosed that it expressly sanctioned the formation of such cooperative buying enterprises, not only in a corporate form but also in a loose intimate association of buyers (order in *F. T. C. v. National Biscuit Co.*, F. T. C. Docket 836, set forth at length, (Apx. B, p. 37). The order in that case was subsequently vacated, but the complaint was not dismissed (299 F. 733); the reversal was based upon a "confession and avoidance" defense available under Sec. 2(b) of the Clayton Act. But the principle of cooperative buying as enunciated by the Commission was expressly preserved by Congress in the enactment of Sec. 4 of the Robinson-Patman Act (Apx. B, p.

35), as so ably and lucidly supported by Senator Utterback in Vol. 80 of the Congressional Record, p. 9557 (fully set forth in Apx B, p. 43). Particular attention of this Court is directed to the italicized phrase in such address, as such phrase was construed by the Court of Appeals as an admission that the petitioners organized the cooperative for the purpose of obtaining higher rebates.

Accordingly, in 1938, the Automotive Group Buyers, Inc. was formed. Immediately after its formation, the Federal Trade Commission began an investigation of its activities, and although such investigation continued for nine years, no complaint was served.

In 1948, the petitioner, Metropolitan Automotive Wholesalers Cooperative, Inc. was created under the New York Cooperative Corporations Law, and continued the activities of the first corporation, and as the Hearing Examiner found "* * * took over all assets and contracts and assumed the liabilities of the Respondent, Automotive Group Buyers, Inc. * * * *" (Apx. Below, p. 13a).

Although the cooperative continued to do business in the same fashion and acted in the same capacity as the dormant corporation, the Commission, in 1949, served a complaint against all petitioners to restrain the activities of the cooperative. The complaint alleges in substance that both buying corporations were used by the petitioners as "instrumentalities" and as agents for the petitioning jobbers to obtain discriminatory prices on their "individual purchases" in violation of Sec. 2(f) of the Clayton Act. The complaint does not allege that Metropolitan Automotive Wholesalers Cooperative Inc., or Automotive Group Buyers Inc. are engaged in commerce.

In support of its complaint, the Commission introduced into the record: The certificate of incorporation of Metro-

politan Automotive Wholesalers Cooperative, Inc. (R. 423); 308 pages of corporate minutes (R. 235-543); 22 exhibits of written and oral contracts made solely by the cooperative (R. 719-889); 22 bills from manufacturers charging merchandise only to the cooperative (R. 719-889); 22 written orders given by the cooperative to various manufacturers (R. 719-889); a financial statement of the cooperative, showing an accumulation of earnings in the amount of $196,000., of which $60,000. was invested in United States Bonds, that it sustained losses in excess of $23,000., that it received negotiable instruments from its members in payment of merchandise; (R. 717) it conceded that both buying groups paid franchise taxes to the State of New York (M. 69); it conceded that the Metropolitan filed marketing reports with the State of New York as required by law, and it introduced six analytical charts prepared by its auditors.

The answer to the complaint denied paragraphs "Two", "Four", "Five", "Six" and "Seven" thereof and alleged in substance that the cooperative-petitioner was organized under the New York Cooperative Corporations Law; that all the petitioning-jobbers were stockholders of said corporation; that it made all contracts for the purchase of merchandise in its own name and on its sole financial obligation; that no member was a party to such contracts; that any rebates due from manufacturers were paid solely and only to the cooperative; that all merchandise shipped to members was paid for by the cooperative on the due date, regardless of whether or not the members had paid therefor to the cooperative; that the cooperative maintained its own bank account and that no member had any right, power or privilege to withdraw such monies; that the net earnings of the cooperative were distributed to the members in accordance with Sec. 4 of the Robinson-Patman Act, and that the cooperative's

activities could never become a competitive factor in the automotive field as indicated by the fact that during the existence of the petitioner-cooperative and Automotive Group Buyers, Inc., the average distribution to members never exceed $50. per week.

In support of its answer and in order to augment the proof submitted by the Commission, the cooperative introduced exhibits proving that all rebates payable under contracts made by it were paid direct to the cooperative; that members paid to the cooperative the full list price for merchandise bought for them, without any deduction whatsoever; that the cooperative accepted from its members, negotiable instruments in payment of current bills; that payment to vendors was made by the cooperative alone, solely out of its fund; that vendors looked to the cooperative alone for payment of bills; that it was sued for merchandise billed to it and shipped to members; that it refused to deal with manufacturers without contracts; that it cancelled shipments to members; that the Automotive Group Buyers, Inc. filed U. S. income tax reports (15 of the most vital exhibits hereinabove mentioned are contained in petitioner's certified brief below following p. 26).

It should be observed from the foregoing that the only exhibits of its own that the Commission relied on consisted of analytical charts prepared by its auditors. The Commission did not introduce a single book, order, bill, check, memorandum, or work-sheet, in support of its complaint that the petitioning-members received discriminatory prices on their "individual purchases".

The hearings began in 1950 and ended in 1958. Altogether this matter has been before the Commission twenty years.

The Hearing Examiner, in his initial decision, found that the Commission had supported its complaint and recommended a cease and desist order against all petitioners. Such order was adopted by the Commission and affirmed by the Court of Appeals. In doing so, none of the decisions mentioned or distinguished the *National Biscuit Co.* case, *(supra)*, from the instant proceedings, although it was cited in all briefs below. On the other hand, the same tribunals relied on *Quality Bakers of America, et al.* v. *Federal Trade Commission*, 114 F. 2d 393, to support their findings and order in this case. The *Quality Bakers* case must be read to discover how thoroughly inapplicable it is to the instant action, but it will undoubtedly account for the Hearing Examiner's refusal to find whether or not the petitioning-cooperative is such under the New York Cooperative Corporations Law and instead find that such cooperation "is a membership corporation" under the laws of the State of New York.

By the cease and desist order here entered, the Federal Trade Commission emaciates the New York Cooperative Corporations Law, it frustrates the purpose and intent of Sec. 4 of the Robinson-Patman Act, it pierces the corporate veil of the cooperative, and translates its activities into individual dealings of its members, exactly in the same manner as if there was no intervention of a cooperative. It seems to uphold the contention of the Commission's attorney that Sec. 4 of the Robinson-Patman Act applies only to farm cooperatives (C.M. p. 47).

Reasons for Granting the Writ

1. No court has yet determined whether members of a cooperative corporation are in violation of Section 2(a) of the Clayton Act (Apx. B, p. 35), by reason of receiving part of the net earnings of such cooperative, distributed

in accordance with Section 4 of the Robinson-Patman Act (Apx. B, p. 35), and which net earnings may have been accumulated by the cooperative corporation from purchases made by it in violation of Section 2(f) of the Clayton Act.

The Court of Appeals, in its opinion, states:

> "Fourth, petitioners contend that because the successor corporate buying group, Metropolitan Automotive Wholesalers Cooperative, Inc., was organized under the Cooperative Corporations Law of the State of New York, it was entitled to the protection of Section 4 of the Robinson-Patman Act, 15 U. S. C. 13b. *Quality Bakers of America* v. *F. T. C.*, 114 F. 2d 393, 400 (1 Cir. 1940), holds that Section 4 does not authorize cooperatives to accept brokerage fees forbidden by Section 2(c) even though these fees are passed on to the members."

But the *Quality Bakers* case, has absolutely no bearing on, or similarity to, the instant proceeding. Quality Bakers is a stock corporation. It received brokerage without rendering service, in violation of Section 2(c) of the Clayton Act (Apx. B, p. 34) and distributed the proceeds to a membership corporation, an affiliate of Quality Bakers, and the Commission found that Quality Bakers was not a cooperative corporation. Although this last cited case is wholly inapplicable to this proceeding, there can be no doubt that the instant Hearing Examiner on the strength of such citation, refused to determine whether or not Metropolitan Automotive Wholesalers Cooperative, Inc., is a cooperative corporation, but instead found that such cooperative is a *membership* corporation under the laws of the State of New York (App. below pp. 10a). The Court of Appeals continues:

> "The fact that earnings which result from illegal activity may be distributed to the association's members does not insulate the association from prosecution for the illegal activity. Clearly Section 4 does not permit a cooperative to violate Section 2(f) even though its savings through receipt of discriminatory prices are passed on to its members. Neither can Section 4 be said to prohibit imputing to the cooperative knowledge possessed by its membership for purposes of establishing knowing receipt under Section 2(f)."

But in what illegal activity did the cooperative engage? The complaint does not allege that such cooperative is engaged in commerce (R. 3). And the attorney for the Commission conceded that the cooperative did not receive any discrimination in price (M. 49). How then can the Court of Appeals confirm the cease and desist order made herein against such cooperative corporation?

And what knowledge did the membership possess which was imputed to the cooperative? Certainly it could not be one of illegal trading by the cooperative. The Commission itself conceded that the cooperative did not receive a discrimination in price. In view of this concession, the holding by the Court of Appeals that the cooperative received a discrimination price is unsupported by the record.

2. The Court of Appeals, in its opinion, held:

> "Finally, petitioners object to the admission of three charts purporting to tabulate sales to respondents by the three manufacturers, Standard, Whitaker, and Moog, in the years 1947 through 1949. The charts were prepared by Commission accountants in order to summarize their investigation of the manufacturers' records. As we have

stand petitioners' argument, the charts should have been excluded because they were not properly identified as required by 28 U. S. C. Sec. 1732. Even if we assume that these charts would have been inadmissible under 28 U. S. C. Sec. 1732 in a judicial proceeding, there was no error in admitting them before the examiner. *Willapoint Oysters, Inc. v. Ewing*, 174 F. 2d 676, 691-692 (9 Cir. 1949), cert. denied, 338 U. S. 860, rehearing denied, 339 U. S. 945."

Such determination elevates shunned pure hearsay evidence to the noble ranks of best evidence. These charts formed the back-bone of the Commission's case. In order to eliminate the cooperative as the buyer of merchandise from the manufacturers named in such charts, three auditors of the Commission each prepared a chart (Commission's Exhibits 1, 2 and 3 attached to the certified Appendix of Appellants below). These three tabulations purport to contain exact copies of the original entries in the books of the vendors. But the Commission failed to produce the original books of the sellers or a single written order, bill, check, letter, memorandum or work sheet to afford the petitioners an opportunity for cross-examination as to the trustworthiness or probative value of such charts.

We are mindful that this petition should be curtailed, but the question here presented for the determination of this Court is so important, that we reluctantly set forth a few questions asked and answers given, to lay the foundation for these charts (M35):

"Q. Now, do the facts and figures appearing on Commission's Exhibit three for identification appear on any other document that are matters of public record? A. Yes, they do.

Q. Where do they appear sir? A. In Docket No. 5723, which is Moog Industries Inc.

Q. Were you a witness for the Commission in that case? A. Yes, sir.

Q. Did you identify and explain the tabulation used in that case? A. I did.

Q. Were you cross examined by the counsel for Moog Industries Inc., concerning the correctness of the facts and figures appearing on tabulations of the exhibits in that case? A. Yes, sir."

* * * * *

(M38)

"Q. All right sir, now would you explain the source of the information contained in column seven, eight and nine on Commission's Exhibit three for identification? A. They came from the rebate work sheets with respect to all the known members and with respect to members of the Metropolitan Automotive Wholesalers Cooperative. It came from the work sheets prepared by Mr. Getz for the years 1947, 1948 and 1949. *It was applied by me to the individual members on the same basis that Moog Industries Inc., applies to the group as a whole.*" (Italics ours)

But the attorney for the Commission gave the correct answer as to the source of the information in Exhibit three. In a letter dated December 4, 1953, he says, in part: (R. p. 35)

"In comparing Commission's Exhibit No. 3 in this matter which is a *composite* of the charts that are in the Commission's Exhibits Nos. 63, 64 and 68 in Docket No. 5723, Moog Industries Inc.,

And the auditor who prepared Commission's Exhibit No. 1 testified that his sources of information were documents in Docket No. 5721 Standard Motor Products, Inc. (M26). The auditor who prepared Exhibit No. 2 also conceded that the sources of his information were contained in Docket No. 5722 Whitaker Cable Corporation (M31). It is very evident from the foregoing testimony that the Exhibits Nos. 1, 2 and 3 were copied from charts in proceedings pending against the three sellers before the instant Hearing Examiner. Further accentuating the untrustworthiness of the three charts is the testimony of Standard Motor Products (M244) and Moog Industries Inc. (M271) that all transactions involving the sale and purchase of merchandise were consummated only with the Metropolitan Automotive Wholesalers Cooperative. Yet, with all these infirmities the petitioners were afforded no opportunity to cross-examine the auditors, by the failure of the Commission to produce any original records or papers on which to base such cross examination.

Over the strenuous objections by the petitioners that no proper foundation was laid and that the three exhibits do not meet the requirements of Section 1732a, U. S. C. A. (M41), the Hearing Examiner nevertheless ruled:

> "The law is well settled that a witness who has examined the records and the witnesses have testified that they examined a number of documents which indicate that they are voluminous and that the witnesses who examined them can put in information as to the examination of the books. I think that the law is well settled and since your objection is wholly on the failure to comply with Section 1732, the objection is over ruled. The documents will be received in evidence as Commission's Exhibits 1, 2 and 3." (M46)

But the documents were not voluminous. In the hearing before the Commission (CM31), the attorney for the Commission stated:

> "This was the third of the cases. In the prior cases before introducing our charts the objection was made by the respondents' counsel, which was a good one and specifically made, that the books and records upon which they were based were not in court. They did know the charts were not admissible but that merely the books and records should be there. So we went around and we subpoenaed and brought them all in and they made a nice pile on the table. Once they were in the courtroom, they never bothered to look at them. We had our accountants there and they never bothered to question them.
>
> When we came to the third case [this proceeding] we decided we wouldn't go to the trouble unless we were forced to, so when it came time to introduce charts we put the accountants on the stand * * * "

The Court of Appeals in affirming the competency of the three charts cited *Willapoint Oysters, Inc.* v. *Ewing* (*supra*). In that case the Court stated:

> "As we held in *Augustine* v. *Bowles*, 149 F. 2d. 93, 96, the rule is that 'Where voluminous documents are a necessary part of the evidence in a cause, it is well settled that tabulations of these documents in the forms of charts and schedules may be introduced for the aid of the trier of fact. 4, Wigmore, 3d ed. Sec. 1230. Most Courts require that the mass thus summarily testified to, if the occasion seems to require it, be placed on hand in Court so

that the opposing party may inspect it and use the material for cross examination.'

This rule we adhere to. Petitioners had adequate access to these work sheets and utilized the information gained therefrom for cross examination."

But in the instant case there were not even produced worksheets of any nature, and the petitioners had no extraneous material for cross-examination.

Strike these charts from the record and the Commissions' entire case must collapse.

3. The attorney for the Commission conceded that neither the petitioner, Automative Group Buyers, Inc., or the petitioner, Metropolitan Automotive Wholesalers Cooperative, received discriminating prices (M49). The complaint does not allege that these corporations are engaged in commerce. How then could the Court of Appeals affirm the issuance of the cease and desist order against said two corporations when the Commission had no jurisdiction over them?

4. The decision of the Court of Appeals is at variance with the decision in *Automatic Canteen Co.* v. *F. T. C.*, 346 U. S. 61. The court in that case held that in a proceeding against a buyer under Section 2(f) of the Clayton Act, the Commission must come forward with the burden of proof that the buyer knowingly induced or received a discrimination in price. When the *Automatic Canteen* case was remanded to the Commission, it dismissed the complaint confessing that its proof proceeded on the theory that once having established an extension of a discriminatory price, the burden of justifying the discrimination rested upon the buyer as provided in Section 2b of the Clayton Act. The instant proceed-

ing was tried by the Commission on exactly the same theory. No where, but no where, in the record is there any evidence introduced by the Commission to prove that the petitioners knew, or had reason to believe, that the vendors had no defenses available under the Clayton Act. To make up for this deficiency in proof, the Hearing Examiner, the Commission and the Court of Appeals cited numerous cases against sellers, including the three manufacturers here involved, in which Courts of Appeals and the Commission found the pricing practices of such vendors to be illegal, and all held that by virtue of such decisions the petitioners had knowledge that the manufacturer had no defenses under the Clayton Act.

What the Hearing Examiner, the Commission and the Court of Appeals failed to point out is that the orders of cease and desist issued against Whitaker Cable Corp. became final in 1956, against Moog Industries, Inc. it became final in 1958, and against Standard Motor Products, Inc. it became final in 1959, and that all transactions involved in this proceeding were consummated years before the orders were made.

The opinion written by the Commission in dismissing the *Canteen* complaint, is so thoroughly applicable to the instant proceeding, both as to age of this case and the theory of the Commission in proving "knowingly receiving" that it is set forth in full on page 40 of the Appendix B hereof.

It is true that the Commission and the Supreme Court relied on a statement made in the *Canteen* case that it is comparatively simple for the commission to prove a sufficient degree of knowledge to provide a basis for prosecution. Said the Supreme Court:

> "By way of example a buyer who knows that he buys in the same quantities as his competitor

> and is served by the seller in the same manner or with the same amount of exertion as the other buyer can fairly be charged with notice that a substantial price differential cannot be justified."

But if the Commission concedes that the buying corporations did not violate 2(f) of the Clayton Act and the record does not contain a single name of any competitor who purchased merchandise from Standard or Whitaker and there is no proof in the record that even the competitors set forth in the incompetent Exhibit 3 of the Commission were known to the petitioners or that the said petitioners had personal knowledge of how much such competitors bought and at what prices, then the proof does not meet the requirements of the above quotation.

5. So intent was the Commission to fit the facts in this case into the *Quality Bakers of America* v. *Federal Trade Commission* that although the petitioning cooperative is cited in the complaint as "Metropolitan Automotive Wholesalers Cooperative, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of New York," and although one of the main points in the case was the determination of the cooperative activities of such corporation, the Hearing Examiner refused to make such decision and instead found that said corporation is a "membership corporation organized, existing and doing business under and by virtue of the laws of the State of New York." There is no question that such finding was made to conform to the facts in the *Quality Bakers* case. Under the New York laws each corporation is invested with different rights and powers; a cooperative corporation may earn profits for its members (App. B, p. 36) whereas a membership corporation cannot earn any profits at all for any

purpose (Apx. B, p. 37). We point out this misinterpretation to stress the misconception by the Commission of the issues in this proceeding. Had the Commission found in accordance with its own exhibit that the cooperative was such under the New York Cooperative Corporations Law, the conclusions by the Commission and the Court would inevitably have been contrary to their decisions herein.

Argument

Section 4 of the Robinson-Patman Act has never been interpreted by the courts insofar as it affects the rights of cooperative members under Section 2(f) of the Clayton Act. The Court of Appeals is of the opinion that if the trading operations of the cooperative involve violations of 2(f) of the Clayton Act, the distribution of its earnings to the members is also tainted with such illegality. Firstly, the Commission's attorney conceded that the cooperative did not receive a discrimination in price. Secondly, the Court in its opinion found that all rebates were received by the cooperative, that part of such rebates was distributed proportionately to the members and that the balance was earmarked for the members. That is precisely what a cooperative under Section 4 is required to do. This is not a stock corporation and the accumulated earnings are not distributed according to stock holdings. Such statement by the Court does not sustain the allegation in the complaint that the members received a discrimination in price on their "individual purchases" in violation of Section 2(f). It is inconceivable why the Commission, with all its investigation facilities, in a complaint under 2(f), was not able after nine years of investigation, to produce a single bill, check, memorandum or original book entry to prove that all transactions which resulted in such violation were con-

summated directly between the sellers here named and the petitioners individually. Perhaps the answer is that it could not.

As a result of such inability, the Commission resorts to analytical charts prepared by its auditors. The incompetency of such charts has been fully explored, but the use of the charts has not.

To his Initial Decision the Hearing Examiner attaches two charts and concludes that such charts prove the receipt by the petitioners of discriminatory prices. First and foremost, nowhere in the record does the Examiner point to any name of any competitor of the petitioners who paid higher prices. Secondly, these charts were never in evidence. Thirdly, if these charts purport to prove transactions between the sellers named therein and the individual petitioners, why does each one of them, including Exhibits 1, 2 and 3 refer to or mention the cooperative?

We also wish to point out that the Court of Appeals alludes to a perfectly innocent statement made in the brief to it, as an admission that the cooperatives were organized for the purpose of obtaining higher rebates. In and of itself such purpose is not illegal but the Commission and the Court of Appeals impute to such statement an illegal motive on the part of the petitioners. Aside from all this, that very phrase was copied from a speech by Senator Utterback in which he explained the purposes for which cooperatives are organized (italicized in Senator Utterback's address) (Appx. B, p. 43).

It is not our practice to deluge the petition with cases that have no bearing upon the issues but we must point to the numerous cases against sellers cited by the Court of Appeals and the Commission. We respectfully contend that nothing in any decision against a seller is authority in a proceeding against the buyer.

As to the cease and desist order being issued against the cooperative and its predecessor, there can be no question that as a matter of law it should be vacated. As pointed out, the Commission's attorney conceded that such cooperative did not receive any discrimination in price and above all the complaint does not charge it with being engaged in commerce. In the absence of such allegation and in view of the admission, the Commission had no jurisdiction to issue such order.

The Court of Appeals is in error when it finds that the Commission came forward with the burden of proof as decided in *Automatic Canteen case* v. *F. T. C.* All the Hearing Examiner found is that,

> "The various Circuit Courts of Appeals in these cases have held that the granting of discounts or rebates by suppliers through group buying organizations, under conditions and circumstances as herein found constituted a price discrimination in violation of Section 2(a) of the Clayton Act" (Apx. below p. 20a).

And, further, the Hearing Examiner, stated:

> "The respondent jobbers were successful buyers in a highly competitive market and knew the facts of life so far as the automotive parts market were concerned" (Apx. below p. 21a).

That is all the proof that the Commission introduced in support of knowingly inducing or receiving in violation of Section 2(f). Compare these findings with the findings in *Automatic Canteen* v. *Federal Trade Commission*, and one is immediately convinced that in this hearing the Commission proceeded on the same theory as it did in the *Canteen* case, to wit: Where the Commission proves an extension of a discriminatory price, the burden rests upon

the petitioners to justify the same under Section 2(b) of the Clayton Act. The opinion of the Commission, when after remander, it dismissed the complaint against Automatic Canteen is appended hereto in Apx. B, p. 40.

What the Commission did to the evidence and facts in the case is no better exemplified than by the Hearing Examiner findings as a matter of law that the petitioner, Metropolitan Automatic Wholesalers Co., Inc. organized and existing under and by virtue of the cooperative corporation laws of the State of New York, is a membership corporation.

From the foregoing, it becomes apparent:

1. That only the cooperative received all rebates and income from manufacturers here involved.

2. That no member received any volume rebates from any manufacturer.

3. That all the member received was his distributive share of the net earnings of the cooperative.

4. That the Federal Trade Commission had no jurisdiction to issue a cease and desist order against the cooperative and that the Court of Appeals erred in affirming the issuance of the cease and desist order.

5. That Commission's Exhibits 1, 2 and 3 should not have been received into evidence.

For the foregoing reasons, it is submitted that the Court of Appeals and the Commission were in error both as to law and to fact and that the writ should be granted.

Respectfully submitted,

B. F. Lerch,
Attorney for Petitioners.

Meyer Schubin,
Of Counsel.

APPENDIX A

Opinion of the United States District Court of Appeals and Order of Affirmance

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 158—October Term, 1959.

(Argued January 14, 1960 Decided May 5, 1960.)

Docket No. 25675

AMERICAN MOTOR SPECIALTIES CO., INC., *et al.*,
Petitioners,

—v.—

FEDERAL TRADE COMMISSION,
Respondent.

Before:

CLARK, HINCKS and WATERMAN,
Circuit Judges.

Petitioners seek to set aside Federal Trade Commission order requiring them to cease and desist from continued violation of Section 2(f) of the Clayton Act as amended by the Robinson-Patman Act. Order affirmed.

B. F. LERCH, New York City, *for Petitioners.*

DANIEL J. MCCAULEY, JR., General Counsel; Alan B. Hobbes, Asst. General Counsel; Francis C. Mayer, Ernest D. Oakland, Attorneys, Federal Trade Commission, *for Respondent.*

WATERMAN, *Circuit Judge:*

Absent a cost justification for volume discounts, or a competitive situation not of the seller's own making, or other exceptions to the basic theory of the Section, a seller under Section 2(a) of the amended Clayton Act, 15 U. S. C. 13(a) may not charge discriminating prices based upon the volume of the buyer's purchases. In a series of cases—*Standard Motor Products* v. *F. T. C.*, 265 F. 2d 674 (2 Cir. 1959), *cert. denied*, 361 U. S. 826; *P. Sorensen Mfg. Co.* v. *F. T. C.*, 246 F. 2d 687 (D. C. Cir. 1957); *P. & D. Mfg. Co.* v. *F. T. C.*, 245 F. 2d 281 (7 Cir. 1957), *cert. denied*, 355 U. S. 884; *C. E. Niehoff & Co.* v. *F. T. C.*, 241 F. 2d 37 (7 Cir. 1957), *mod'd*, 355 U. S. 411 (1958), *rehearing denied*, 355 U. S. 968; *E. Edelmann & Co.* v. *F. T. C.*, 239 F. 2d 152 (7 Cir. 1956), *cert. denied*, 353 U. S. 941; *Whitaker Cable Corp.* v. *F. T. C.*, 239 F. 2d 253 (7 Cir. 1956), *cert. denied*, 353 U. S. 938, *rehearing denied*, 356 U. S. 905; *Moog Industries* v. *F. T. C.*, 238 F. 2d 18 (8 Cir. 1956), *aff'd*, 355 U. S. 411 (1958), *rehearing denied*, 356 U. S. 905—this court and three other courts of appeals have sustained the Federal Trade Commission's findings that the price system of volume discounts given by various manufacturers of automobile replacement parts has been violative of Section 2(a). In this case it is the conduct of the *buyers* from those manufacturers that is attacked.[1]

---

[1] The Commission informs us that as of September 24, 1959 cease and desist orders have been entered against six other groups of buyers similar to petitioners.

Petitioners seek review of a cease and desist order issued by the Commission on March 12, 1959, charging them with violation of Section 2(f) of the amended Clayton Act, 15 U. S. C. 13(f), a section making it unlawful for buyers knowingly to induce or receive prices violative of Section 2. There are nineteen petitioners: seventeen firms "jobbing" automotive replacement parts in the New York City metropolitan area, and two buying groups, Automotive Group Buyers, Inc., and its successor, Metropolitan Automotive Wholesalers Cooperative, Inc., corporations organized by the seventeen member firms.

Petitioners' brief describes the purpose of the two buying groups in the following words, "* * * the members sought to associate themselves together in a collective activity for the purpose of achieving the economies and price advantages of larger scale buyers * * *". The method of operation of the two buying groups has been constant in the years of operation since 1938 when Automotive Group Buyers, Inc. was established. Manufacturers were requested to submit price lists to the group's executive secretary. If the price lists were approved, apparently by a committee appointed for the purpose, the member firms would place their individual orders in the name of the buying group; i.e., the orders were written on forms bearing the name of the buying group, but these forms were either sent by the individual firm directly to the manufacturer or were sent through the group office without any consolidation of member orders. Shipments were made directly to the individual firm. The reason for this group buying arrangement is clear. As the cases cited in the first paragraph of this opinion set forth, it was a frequent practice of manufacturers to grant annual rebates to buyers in the form of a percentage of the buyer's orders for the year, the percentage of rebate to sales increasing with the total dollar

volume of orders. Thus, from the mere fact that an organization of buyers was able to persuade a manufacturer to treat the orders of the various individual member firms as coming from a single source, the amount of rebate for each member firm's dollar of order was increased, thereby placing each member firm at an advantage over its unorganized competitors. From the statement in petitioners' brief quoted at the beginning of this paragraph petitioners appear to concede that the two buying groups were formed for the purpose of obtaining increased rebates. The rebates were paid to the group, and a portion thereof was periodically distributed to each member. The amounts so distributed were apportioned according to the per cent which each individual firm's purchases bore to the group's total purchases from the manufacturer. The remainder was accumulated, but the share of each member in this fund retained out of the rebates was earmarked according to the above formula. The Commission concedes that member firms were not required to purchase from the manufacturers whose prices had been group-approved, but it clearly was in the interest of a member to do so, and just as clearly it was in the interest of members to exert moral pressure upon fellow-members to so purchase.

At the outset, although the Commission based its case upon the prices received from three manufacturers whose pricing systems have previously been held violative of Section 2(a)—*Standard Motor Products*, *Whitaker Cable*, and *Moog Industries*, *supra*—petitioners contend that the Commission did not prove that these prices violated Section 2.

Petitioners first contend that the Commission failed to demonstrate that these prices may have had the effect of substantially lessening competition or of tending to create a monopoly. This contention is clearly unsound for the reasons stated in *Standard Motor Products*, *supra*, at pp. 676-77; *Whitaker Cable*, *supra*, at pp. 254-255; *Moog*

Industries, supra, p. 51. The discussion in *Moog Industries, supra*, at pp. 49-50, also disposes of petitioners' second contention that the Commission failed to prove that discriminatory rebates were granted on goods of "like grade and quality."

Petitioners also strenuously contend that under *Automatic Canteen* v. *F. T. C.*, 346 U. S. 61 (1953), the Commission failed to establish that petitioners *knowingly* induced or received discriminatory prices, a finding required by Section 2(f). *Automatic Canteen* held that, despite the provisions of Section 2(b), the Commission did not establish, *prima facie*, a violation of Section 2(f) merely by introducing evidence that the buyer had received prices lower than its competitors, but that the Commission must also come forward with some evidence that the buyer *knew* that the prices it was receiving violated Section 2(a). However, the Court, *supra*, at pp. 79-80, spoke further in language that is here very pertinent:

> But trade experience in a particular situation can afford a sufficient degree of knowledge to provide a basis for prosecution. *By way of example a buyer who knows that he buys in the same quantities as his competitor and is served by the seller in the same manner or with the same amount of exertion as the other buyer can fairly be charged with notice that a substantial price differential cannot be justified.* The Commission need only to show, to establish its prima facie case, that the buyer knew that the methods by which he was served and quantities in which he purchased were the same as in the case of his competitor. If the methods or quantites differ, the Commission must only show that such differences could not give rise to sufficient savings in the cost of manufacture, sale or delivery to justify the price differential, and that the buyer, know-

> ing these were the only differences, should have known that they could not give rise to sufficient cost savings. (Italics supplied.)

Petitioners of course knew that they, as individual firms, were receiving goods in the same quantities and were served by sellers in the same manner as their competitors, and hence organized themselves into a buying group in order to obtain lower prices than their unorganized competitors. Hence, by the very fact of having combined into a group and having obtained thereby a favorable price differential, they each, under *Automatic Canteen*, were charged with notice that this price differential they each enjoyed could not be justified. And this knowledge of each of the seventeen individual firms is imputable to the organization of which they were all members. Thus, irrespective of whether the buying groups' efforts to bargain with the various manufacturers constituted an improper *inducement* under Section 2(f), we hold that the Commission introduced sufficient evidence to fulfill the requirements of *Automatic Canteen* when it showed that petitioners knowingly received preferential price treatment of such a nature as to violate Section 2.

Fourth, petitioners contend that because the successor corporate buying group, Metropolitan Automotive Wholesalers Cooperative, Inc., was organized under the Cooperative Corporations Law of the State of New York, it was entitled to the protection of Section 4 of the Robinson-Patman Act, 15 U. S. C. 13b. *Quality Bakers of America* v. *F. T. C.*, 114 F. 2d 393, 400 (1 Cir. 1940) holds that Section 4 does not authorize cooperatives to accept brokerage fees forbidden by Section 2(c) even though these fees are passed on to the members. Section 4 states that nothing in the Robinson-Patman Act shall prevent a cooperative association from returning to its members,

producers, or consumers any part of the association's earnings. Section 4 does not confer upon cooperative associations any blanket exemption from the Robinson-Patman Act. It only protects a cooperative association from charges of violating the Act premised upon the association's method of distributing earnings. See *Farmers Cooperative Co.* v. *Birmingham*, 86 Supp. 201, 230 (N. D. Iowa 1949). The fact that earnings which result from illegal activity may be distributed to the association's members does not insulate the association from prosecution for the illegal activity. Clearly Section 4 does not permit a cooperative to violate Section 2(f) even though its savings through receipt of discriminatory prices are passed on to its members. Neither can Section 4 be said to prohibit imputing to the cooperative knowledge possessed by its membership for purposes of establishing knowing receipt under Section 2(f).

Finally, petitioners object to the admission of three charts purporting to tabulate sales to respondents by the three manufacturers, Standard, Whitaker, and Moog in the years 1947 through 1949. The charts were prepared by Commission accountants in order to summarize their investigation of the manufacturers' records. As we understand petitioners' argument, the charts should have been excluded because they were not properly identified as required by 28 U. S. C. §1732. Even if we assume that these charts would have been inadmissible under 28 U. S. C. §1732 in a judicial proceeding, there was no error in admitting them before the examiner. *Willapoint Oysters, Inc.* v. *Ewing*, 174 F. 2d 676, 691-692 (9 Cir. 1949), *cert. denied*, 338 U. S. 860, *rehearing denied*, 339 U. S. 945.

The Commission's order is affirmed.

FINAL DECREE AFFIRMING ORDER TO CEASE AND DESIST

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 25675

AMERICAN MOTOR SPECIALTIES CO., INC., a corporation, et al.,

Petitioners,

v.

FEDERAL TRADE COMMISSION,

Respondent.

American Motor Specialties, Inc., a corporation, et al., petitioners herein, having filed in this Court on May 20, 1959, a petition to review and set aside an order to cease and desist issued against them on March 13, 1959, by the Federal Trade Commission, respondent herein, in a proceeding before it entitled "In the Matter of American Motor Specialties Co., Inc., a corporation, et al., Docket No. 5724;" and a copy of said petition having been served upon respondent; and respondent having thereafter certified and filed herein, as required by the Federal Trade Commission Act, a transcript of the entire record in said proceeding; and the matter having been heard by this Court on briefs and oral argument on January 14, 1960; and this Court having rendered its decision on May 5, 1960;

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the aforesaid order to cease and desist issued by the Federal Trade Commission, respondent herein, be, and it hereby is, affirmed; and,

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the aforesaid petition to set aside the aforesaid order to cease and desist be, and it hereby is, denied.

By the Court:

CHARLES E. CLARK
STERRY R. WATERMAN

Dated: June 6, 1960

APPENDIX B

SEC. 2 OF THE CLAYTON ACT: DISCRIMINATION IN PRICE, SERVICE OR FACILITIES. (15 U. S. C. A., sec. 13, as amended.)

SEC. 2 (a) That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either of any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided*, That nothing here contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: *Provided, however*, That the Federal Trade Commission may, after due investigation and hearing to all interested parties, fix and establish quantity limits, and revise the same as it finds necessary, as to particular commodities or classes of commodities, where it finds available purchasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly in any line of commerce; and the foregoing shall then not be construed to permit differentials based on differences in quantities greater than those so fixed and established;

And provided further, That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade: *And provided further*, That nothing herein contained shall prevent price changes from time to time where in response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned.

(b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, however*, That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

(c) That it shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact

for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid.

* * * * *

(f) That it shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section.

Sec. 4 of the Robinson-Patman Act (15 U. S. C. A., sec. 13b) reads as follows:

> Nothing in this Act shall prevent a cooperative association from returning to its members, producers, or consumers the whole, or any part of, the net earnings or surplus resulting from its trading operations, in proportion to their purchases or sales from, to, or through the association.

Section 1732(a), as amended, U. S. C. A. 28, reads as follows:

> "In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of such act, transaction, occurrence, or event, if made in regular course of any business, and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter."

Section 44, Title 15, U. S. C. A. defines "commerce" as follows:

> "'Commerce' means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation."

Section 45(b) 15 U. S. C. A. provides in part as follows:

> "* * * If upon such hearing the commission, authority, or board, as the case may be, shall be of the opinion that any of the provisions of said sections have been or are being violated, it shall make a report in writing in which it shall state its findings as to the facts, and shall issue and cause to be served on such person an order requiring such person to cease and desist from such violations. * * *"

155 of the New York Session Laws of 1932 at page 812 defines a cooperative corporation as follows:

> "A cooperative corporation, within the meaning of this article, shall be deemed to be a corporation organized for and conducting its business primarily for the mutual help and benefit of its share holders, employees and patrons without profit and the earnings and savings of which are distributed, whether in the form of cash, stock or evidences of indebtedness or any services, proportionately and equitably among the persons for which it does business, upon the basis of the amount of sales, purchases or other services rendered to or by such persons, provided, however, that such corporation may pay not to exceed 8 per centum dividends upon its capital stock."

The New York Membership Corporations Law defines a membership corporation as follows:

> "The term 'membership corporation' means a corporation not organized for pecuniary profit, incorporated under this chapter, or under any law repealed by this chapter; * * *" (McKinney's Consolidated Laws of New York, Book 34).

In *Federal Trade Commission* v. *National Biscuit Company* (Docket No. 836 or No. 856), the order reads in part as follows:

> "PARAGRAPH FIVE: That the respondent allows a discount on the aggregate monthly purchases of its products to each customer, as follows:
>
> "No discount if the aggregate monthly purchases amount to less than $15.
>
> 5% discount on all purchases if the total amounts to $15. or more, but less than $50. in one month.
>
> 10% discount on all purchases if the total amounts to $50. or more, but less than $200. in one month.
>
> 15% discount on all purchases if the total amounts to $200. or more in any one month."
>
> * * * * * *
>
> "PARAGRAPH FOURTEEN: In order to compete with retail units of chain store systems in selling National Biscuit Company products, groups of independent retailers in many localities in different parts of the United States have attempted to combine their purchases and obtain discounts equal to those granted to the chain stores:
>
> "(a) In some instances one of the independent retailers would buy for two or three of his neighbors—placing the order, receiving all deliveries at

his store, and paying for the goods, the other grocers in the combination calling at his store and getting the goods thus ordered and received by him.

"(b) In some instances groups of independent retailers have requested the National Biscuit Company to make them deliveries similar to those it makes to the separate units or retail grocery stores of chain systems; to take orders from them as it takes orders from separate units or retail grocery stores of chain systems; and have offered to pay respondents cash on delivery, or in the same way as the chain stores pay; and have further offered to meet any requirements the Respondent makes of the chain systems.

"(c) IN OTHER INSTANCES CORPORATIONS HAVE BEEN FORMED, IN WHICH THE STOCK IS OWNED EXCLUSIVELY BY RETAIL GROCERS. THESE CORPORATIONS HAVE REQUESTED THE NATIONAL BISCUIT COMPANY TO SELL THEIR STOCKHOLDERS OR MEMBERS ON THE SAME TERMS AND IN THE SAME MANNER AS SAID RESPONDENT SELLS TO SEPARATE UNITS OR RETAIL GROCERY STORES OF CHAIN SYSTEMS. THESE CORPORATIONS HAVE OFFERED CASH ON DELIVERY FOR THE GOODS, OR TO PAY FOR THEM AS THE CHAIN STORES PAY, AND TO MEET EVERY REQUIREMENT THAT THE NATIONAL BISCUIT COMPANY MAKES OF THE CHAIN SYSTEM. (Capsours)

* * * * *

"PARAGRAPH FIFTEEN: The respondent sells its products to purchasers operating grocery chain systems, where such systems divide their purchases among the separate units or retail grocery stores of the system.

• • • • •

"PARAGRAPH NINETEEN: Most of the biscuit and cracker manufacturers along the Pacific Coast sell associations and combinations of retail grocers in the same way as they sell chain systems, allowing them a discount on the gross purchases of all their members.

"PARAGRAPH TWENTY: The Respondent, who refuses to sell in the East and Middle West to associations and combinations of retail grocers and allows them a discount on the gross purchases of all their members, does sell to such associations and combinations along the Pacific Coast, and gives them a discount on the gross purchases of all their members. The National Biscuit Company sold the Spartan Grocers of Los Angeles, California, a cooperative association composed of independent retail grocers, and allowed them a discount on the gross purchases of all its members, for approximately three years, and was so selling them at the time of the taking of testimony in this proceeding. Respondent also was selling the United Grocers of Oregon, another cooperative association composed of independent retail grocers, and was allowing them a discount on the gross purchases of the associated members at the time of the taking of testimony in this proceeding at Portland, Oregon.

• • • • •

"CONCLUSION

"That the practice of said Respondent, under the conditions and circumstances described in the foregoing findings, are unfair methods of competition in interstate commerce and constitute a violation of the Act of Congress approved September 26, 1914, entitled, 'An Act To Create a Federal Trade Commission, to define its powers and duties, and for other purposes,' and violate the provisions of Section 2 of an Act of Congress approved October 15, 1914, entitled 'An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes'."

In issuing the cease and desist order, the Commission restrained National,

"2. From giving to purchasers operating two or more paid units or retail grocery stores of chain systems, a discount on the gross purchases of all the separate units or retail stores of such system, where same or a similar discount on gross purchases is not allowed or given to associations or combinations of independent grocers operating retail grocery stores similar to the separate units or stores of such chain."

When the *Automatic Canteen* case was remanded to the Commission, it dismissed the complaint (FTC Docket 4933) and advanced the reasons therefor as follows:

* * * * * *

"We further found that Automatic Canteen knew that the prices accorded it were lower than the prices accorded competitors because (1) these confections were so-called standard priced items, it

knew the standard price and knew that sales to most competitors were made at those prices and (2) because in some instances it was advised that the prices to it were lower than the prices charged others.

"In our findings we emphasized that in negotiating for these prices Automatic used a variety of methods. We found that at times it informed prospective suppliers of the prices and terms of sales which would be acceptable to it without any inquiry on its part as to whether or not the supplier could justify the price on a cost basis. At other times it refused to buy unless the price to it was reduced below the price at which the supplier sold the same merchandise to others. We also found that in many cases respondent sought to explain to prospective suppliers that certain savings would accrue from selling to respondent which would, in respondent's opinion, justify a lower price.

"The findings summarized above were before the Supreme Court and the Court held them insufficient. In a carefully pin-pointed opinion the Court held that the Commission had the burden in the first instance of going forward with evidence which would show that the buyer knew or should have known that the differentials constituted prohibited discriminations.

"In terms of the present record this means that as a basis for a conclusion that a prima facie case has been established the Commission must find further that Automatic Canteen knew or should have known that the prices it received were not justified under the cost proviso of 2(a)4. That brings us to the first question on this remand: whether or not at the close of the Commission's case-in-chief there was evidence sufficient to warrant a finding against

respondent in accordance with the criteria set up by the Supreme Court.

"The prosecution tried the case on the theory that cost justification was a matter of defense to be established by the buyer charged with violation of 2(f). While this position was emphasized throughout the trial, the prosecution on the motion to dismiss did claim by way of further argument that it had actually proved that respondent knew or should have known that the prices it received were not cost justified. Neither the citations offered in this respect by the prosecution nor a review of the record disclosed any evidence of probative value which would warrant this necessary further finding.

"Automatic Canteen knew its market and even had considerable knowledge of seller's cost; but this knowledge was not related in the record to specific sellers and specific price situations. Certainly there is no evidence that respondent had direct knowledge that the prices it received were not cost justified. And a careful and studied analysis of the evidence adduced fails to reveal any evidence to support a finding of constructive knowledge. Incidentally, many of the transactions involved took place at or about the time of the passage of the amendment to the Clayton Act in 1936.

* * * * *

"This case has been in litigation for over a decade and is based upon evidence many years older than its onset. Lapse of time alone has made most all of the evidence now on record unresponsive to present market conditions.

* * * * * *

"The proceedings as to 2(f) are therefore dismissed." (continued, next page)

In line with the foregoing order, the opinion noted:

> "In similar vein we have already dismissed certain other 2(f) proceedings which were initiated by us prior to the decision of the Supreme Court and which were predicated on our erroneous interpretation of this subsection of the Act. See, In the Matter of Safeway Stores, Incorporated, Docket 5990 (1953); In the Matter of The Kroger Company, Docket 5991 (1953); As to respondent, Philco Corporation, in the Matter of Sylvania Electric Products, Inc. and Philco Corporation, Docket 5728 (1954)."

Congressman Utterback at the time of the passage of the Robinson-Patman Act in the House explained Sec. 4 thereof (p. 9057, Vol. 80 of the Congressional Record) in the following cogent and lucid language:

> "I need not pause to describe the cooperative movement. You are all familiar with it, whether it be a cooperative of farmers to buy what they need or to sell what they produce; a cooperative of consumers to purchase the necessities of life; or a cooperative of independent merchants to buy what they propose to sell across the counter to their consumer customers. I need only remind you that in its essential character the cooperative movement is a device whereby individual smaller units in production, distribution, or consumption *associate themselves together in a collective activity for the purpose of achieving the economies and price advantages of larger scale* operations. This bill reserves those advantages and expressly authorizes their translation into differences in price wherever those differences represent real economies.

This bill will afford positive protection to cooperatives in two ways: First, it will reduce the menace of oppressive discrimination in favor of larger corporate competitors against which cooperative activity is now defensively necessary; second, it will insure to cooperative enterprise the fuller fruits of its activity. It will guarantee to it the achievement of the full economies and price advantages to which the size and scale of its operations actually entitle it as compared with its larger corporate competitors.

So far as concerns freedom to organize cooperative enterprises, freedom of those enterprises to deal with others, either in the purchase of needs for their members, or in the sale of their members' products; and so far as concerns full freedom to distribute among their members any earnings or surplus resulting from their trading operations, there is nothing whatever in the bill to impede or limit those activities. There is, on the contrary, an express reservation, denying any intent or effect to limit cooperatives in the distribution of their earnings or surplus to their members on a patronage basis.

It is evident, upon a full examination of the bill, that not only is there nothing in it to hurt cooperatives, but that there is much in it to protect and assist them."

And on page 9561, Vol. 80 of the Congressional Record, Congressman Utterback further stated:

"Section 4 represents another provision added to the bill in the fullness of caution to protect the distribution of cooperative earnings or surplus among their members on a patronage basis. In the dealings of cooperatives with others they share, of course, the protections and guaranties of the bill as to equal

treatment and equal opportunity which it extends to producers, manufacturers, and merchants in trade and commerce generally. It leaves the members of cooperatives free to seek through cooperative endeavor the economies and savings of mass operations and assures to them, as compared with their larger corporate competitors, any real economies and savings to which those mass operations entitle them, and which they often now do not receive. There is nothing in last section of the bill that distinguishes cooperatives, either favorably or unfavorably, from other agencies in the streams of production and trade, so far as concerns their dealings with others."

LE COPY

SUPREME COURT, U.S.
FILED
SEP 26 1960
JAMES R. BROWNING, Clerk

No. 368

In the Supreme Court of the United States

OCTOBER TERM, 1960

AMERICAN MOTOR SPECIALTIES CO., INC., ET AL.,
PETITIONERS
v.
FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
ROBERT A. BICKS,
Assistant Attorney General,
CHARLES H. WESTON,
Attorney,
Department of Justice, Washington 25, D.C.

DANIEL J. MCAULEY, JR.,
General Counsel,
ALAN B. HOBBES,
Assistant General Counsel,
Federal Trade Commission,
Washington 25, D.C.

In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 368

AMERICAN MOTOR SPECIALTIES CO., INC., ET AL.,
PETITIONERS
v.
FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 24–32) is reported at 278 F. 2d 225. The opinion and order of the Federal Trade Commission (R. 26a–35a)[1] are not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on June 6, 1960 (Pet. 31–32). The petition for a writ of certiorari was filed on August 30, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] "R. —a" refers to petitioners' appendix in the court of appeals; "R. —b," to the Commission's.

QUESTIONS PRESENTED

Petitioners are 17 jobbers of automotive replacement parts and a corporation which they organized for the purpose of channeling their purchases through it in order to obtain, upon the basis of the aggregate purchases made through the corporation, discounts granted by sellers on annual purchase volume. The Commission found that petitioners thereby knowingly received prohibited price discriminations, in violation of § 2(f) of the Clayton Act. The five "questions presented" which the petition sets forth (pp. 2–5) appear to present only the following issues:

1. Whether the Commission had jurisdiction to issue a cease and desist order against the corporation through which the jobber members purchased.

2. Whether the Commission's findings are supported by substantial admissible evidence.

3. Whether petitioners' conduct is given exemption by § 4 of the Robinson-Patman Act.

STATUTES INVOLVED

Sections 2(a) and 2(f) of the Clayton Act, 15 U.S.C. 13(a), 13(f), and § 4 of the Robinson-Patman Act, 15 U.S.C. 13b, are set forth in Appendix B to the petition for certiorari (Pet. 33–35).

STATEMENT

The jobber petitioners sell automotive parts to garages, service stations, car dealers, fleet owners and other jobbers, in competition with other jobbers and wholesalers (R. 2b, 21b, 47b, 48b, 52b–53b, 70b, 71b, 74b). Many manufacturers from whom the jobbers purchase have allowed rebates from their list

prices, the rebate being based upon the customer's total purchases during a year's time (R. 14a). The jobber petitioners set up a system of group buying, utilizing a corporation organized under the New York Cooperative Corporation Law, so as to obtain from the seller-manufacturers rebates calculated on the aggregate purchases of the corporate members (*ibid.*) The group undertook to negotiate with sellers a satisfactory price arrangement, and if negotiations were successful the jobber members, although ordering individually, placed their orders in the name of the corporate buying agent (Pet. 26). The seller delivered goods so purchased direct to the actual purchaser (R. 16a), but the buying agent paid for the goods delivered, remitting monthly for the aggregate purchases of its members and collecting in turn from the purchasing members (R. 15a). Periodically the buying corporation distributed among its members the net amount received as rebates (*i.e.*, the gross rebates received less the expenses of the group-buying operation), in proportion to the amount of the individual member's purchases (*ibid.*).

The Commission found that there was no difference of substance between purchases thus aggregated for the purpose of obtaining rebates not otherwise available and purchases made by the jobbers acting individually and independently (R. 16a), and that the group buying was, in reality, a bookkeeping device for the collection of rebates and discounts (R. 15a). It found that the price differentials which the petitioners obtained were substantial, and that the resulting discriminatory prices lowered their purchasing

costs and gave them a material competitive advantage over other jobbers (R. 19a, 20a). It further found that petitioners knew that the rebates which they obtained did not reflect cost saving to the seller resulting from differing methods of delivery or differing sales volume, and that they accordingly knowingly induced and received prohibited price discriminations in violation of § 2(f) of the Clayton Act (R. 21a, 23a).[2]

ARGUMENT

1. Petitioners contend that the complaint failed to allege that the buying corporation utilized to procure price discriminations, petitioner Metropolitan Automotive Wholesalers Cooperative, Inc., was "engaged in" interstate commerce so as to be within § 2(f), which makes it unlawful for any person "engaged in" interstate commerce knowingly to induce or receive a prohibited price discrimination. That argument was not presented to the court below (R. 8a-9a), and accordingly affords no basis for certiorari. See *Helvering* v. *Minnesota Tea Co.*, 296 U.S. 378; *Burnet* v. *Commonwealth Improvement Co.*, 287 U.S. 415; *Federal Trade Commission* v. *Travelers Health Assn.*, 362 U.S. 293, fn. 4 at 298–299. In any event, the contention is without merit. A corporation clearly is engaged in interstate activity sufficient to bring it within § 2(f) when, as alleged and proved here, it is regularly engaged, as an agent for others, in the purchase of goods for shipment and delivery across state lines, and in making remittances in pay-

[2] The findings referred to, initially made by the Examiner, were adopted by the Commission (R. 35a).

ment for goods so shipped. *United States* v. *South-Eastern Underwriters Assn.*, 322 U.S. 533, 547, 553, *Quality Bakers of America* v. *Federal Trade Commission*, 114 F. 2d 393, 399 (C.A. 1).

2. Petitioners contend that there is no competent evidence adequate to support the Commission's findings, because the supporting evidence consisted primarily of charts of manufacturers' sales to petitioners, and these charts were improperly admitted in evidence (Pet. 12–17). The charts, which were prepared by Commission accountants to summarize information disclosed by their investigation of certain corporate records (see Pet. 30), were objected to on the ground that they did not meet the tests of 28 U.S.C. 1732(a) governing admissibility of records made in the regular course of business.[3] But § 1732(a) applies only to "court" proceedings, and petitioners' objection based on that section plainly was not well taken. Moreover, it is settled, by statute[4] and by judicial decision,[5] that administrative agencies are not bound to adhere to common law exclusionary rules of evidence. And the apparent objection that the charts are of low probative value (Pet. 15) raises a question of the weight of the evidence, which is committed to the Commission, not a reviewing court.

---

[3] See Examiner's ruling quoted by petitioners (Pet. 15).

[4] Section 5 of the Administrative Procedure Act provides that in administrative proceedings "any oral or documentary evidence may be received," * * *. 5 U.S.C. 1006(c).

[5] *Willapoint Oysters, Inc.* v. *Ewing*, 174 F. 2d 676, 690-691 (C.A. 9), certiorari denied, 338 U.S. 860. See also *United States* v. *Kelley*, 105 F. 2d 912 (C.A. 2); *United States* v. *Becker*, 62 F. 2d 1007 (C.A. 2); *United States* v. *Cotter*, 60 F. 2d 689 (C.A. 2), certiorari denied, 287 U.S. 666.

A further question raised as to the sufficiency of the evidence relates to whether the Commission satisfied the burden of proof resting on it in a § 2(f) proceeding to show that a buyer charged with violation knew that the low prices which he had received were price discriminations illegal under the provisions of § 2(a) (Pet. 17–19). In *Automatic Canteen Co.* v. *Federal Trade Commission*, 346 U.S. 61, this Court held that in a § 2(f) proceeding the Commission has in this respect the burden of going forward with the evidence, but the opinion also pointed to circumstances which, if established, would satisfy that burden. 346 U.S. at 79–81. In the instant case the court below observed that the very circumstances thus referred to in *Automatic Canteen* had been established (Pet. 28–29). Petitioners fail to show error in the court's reasoning or conclusion.

3. Petitioners' final point (Pet. 19–20) is that their conduct is given exemption by § 4 of the Robinson-Patman Act, 15 U.S.C. 13b, which provides that nothing contained in the Act (which *inter alia* amended § 2 of the Clayton Act) shall prevent a cooperative association from returning to its members its net earnings in proportion to their purchases or sales from, to, or through the association. The same claim of exemption, in a case involving violation of § 2(c) of the Clayton Act, was made and rejected in *Quality Bakers of America* v. *Federal Trade Commission*, 114 F. 2d 393, 400 (C.A. 1). The court below dealt with the contention aptly and decisively as follows (Pet. 30):

> Section 4 does not confer upon cooperative associations any blanket exemption from the

Robinson-Patman Act. It only protects a cooperative association from charges of violating the Act premised upon the association's method of distributing earnings. See *Farmers Cooperative Co. v. Birmingham*, 86 [F.] Supp. 201, 230 (N.D. Iowa 1949). The fact that earnings which result from illegal activity may be distributed to the association's members does not insulate the association from prosecution for the illegal activity. Clearly Section 4 does not permit a cooperative to violate Section 2(f) even though its savings through receipt of discriminatory prices are passed on to its members.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General,

ROBERT A. BICKS,
Assistant Attorney General.

CHARLES H. WESTON,
Attorney.

DANIEL J. MCCAULEY, JR.,
General Counsel,

ALAN B. HOBBES,
Assistant General Counsel,
Federal Trade Commission.

SEPTEMBER, 1960.

U.S. GOVERNMENT PRINTING OFFICE 19

FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 368

AMERICAN MOTOR SPECIALTIES CO., INC., ET AL.,
Petitioners,

against

FEDERAL TRADE COMMISSION, *Respondent.*

MOTION OF MID-SOUTH DISTRIBUTORS, ET AL., TO DEFER CONSIDERATION OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

DAVID C. MEDINA
ROBERT L. WAGE

of

HOWREY, SIMON, BAKER & MURCHISON
1707 H Street, N.W.
Washington 6, D.C.

HOLMAN TAYLOR
Memphis, Tennessee

FRANK J. TAYLOR, JR.
Mobile, Alabama

Attorneys for Mid-South Distributors, et al.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 368

AMERICAN MOTOR SPECIALTIES CO., INC., ET AL.,
Petitioners,

Against

FEDERAL TRADE COMMISSION, *Respondent*

MOTION OF MID-SOUTH DISTRIBUTORS, ET AL., TO DEFER CONSIDERATION OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Mid-South Distributors, Cotton States, Inc., and others, petitioners in Docket No. 17,860, now pending decision before the United States Court of Appeals for the Fifth Circuit, a proceeding to review and set aside an order of the Federal Trade Commission, respectfully move this Court to defer consideration of the petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit in the above-

captioned matter, filed August 30, 1960. In support of this motion, movants show:

1. The instant proceeding against American Motor Specialties Co., Inc., and others, and the proceeding against movants originated by complaint of the Federal Trade Commission in 1949 and 1950, respectively. While other questions not raised in the *American Motor Specialties* case are raised in *Mid-South*, both cases were decided by the Commission in 1959, and now raise for the first time the question whether the Federal Trade Commission has met the required standard of proof of knowledge of cost justification under Subsection 2(f) of the Robinson-Patman Act as set forth by this Court in its decision in *Automatic Canteen Co. of America* v. *Federal Trade Commission*, 346 U.S. 61. Prior to these cases, and since this Court's decision in *Automatic Canteen*, no proceeding under Subsection 2(f) has reached the Courts for decision on its merits.

2. On January 24, 1959, the Federal Trade Commission rendered its decision in the *Mid-South Distributors* case (sub nom. *In the Matter of D & N Auto Parts Co., Inc., et al.*, CCH Trade Reg. Rep., ¶27,846), holding that the charged buyers knowingly received a price discrimination in violation of Subsection 2(f). On March 12, 1959, relying upon its *D & N Auto Parts* ruling, the Commission entered its decision in the instant case, holding that the charged buyers there had knowingly received an unlawful price discrimination in violation of Subsection 2(f).

3. On July 3, 1959, petition to review and set aside the order of the Federal Trade Commission was filed in the United States Court of Appeals for the Fifth Circuit on behalf of Mid-South Distributors, et al. On

October 10, 1960, oral argument was held in the United States Court of Appeals for the Fifth Circuit in the *Mid-South Distributors* case. The matter is now submitted for final decision to the Court.

4. On May 5, 1960, the decision of the Court of Appeals for the Second Circuit was handed down, affirming the Commission's order in the *American Motor Specialties* case. Thereafter, on August 30, 1960, the instant petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit was filed in this Court.

5. While substantial issues are raised in the *Mid-South Distributors* case in the Fifth Circuit Court of Appeals which were not raised in the *American Motor Specialties* case in the Second Circuit, both cases present the important question of whether the Federal Trade Commission properly applied the standard of proof of knowledge of lack of cost justification required by this Court in *Automatic Canteen*. This question has not heretofore been decided by this Court. Both cases also involve questions as to the construction of the exemption for cooperative associations provided in Section 4 of the Robinson-Patman Act, not heretofore passed upon by this Court. Since the forthcoming decision of the Fifth Circuit should deal with these two questions of law, we believe that decision, if before this Court at the time it considers the instant petition, will afford the Court a fuller opportunity to assess the nature and importance of these questions for review.

WHEREFORE, in view of the parallel nature of these two proceedings in these several important respects, Mid-South Distributors, and others, petitioners in No.

17,860 in the United States Court of Appeals for the Fifth Circuit, ask that this Court defer consideration of the petition for a writ of certiorari in the instant proceeding until decision in the *Mid-South Distributors* case has been handed down by the Fifth Circuit Court of Appeals.

Respectfully submitted,

DAVID C. MURCHISON
ROBERT L. WALD

of

HOWREY, SIMON, BAKER & MURCHISON
1707 H Street, Northwest
Washington 6, D. C.

HILLSMAN TAYLOR
Memphis, Tennessee

FRANK J. TIPLER, JR.
Andalusia, Alabama

Attorneys for Movants